Statement of the American Farm Bureau Federation

TO THE

HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

REGARDING: THE CLEAN WATER RESTORATION ACT

APRIL 16, 2008

600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024 | p. 202.406.3600 | f. 202.406.3606 | www.fb.org

Mr. Chairman and members of the House Committee on Transportation and Infrastructure, my name is Carl Shaffer. I own and operate a farm in Columbia County, Pennsylvania, where I raise green beans for processing, corn and wheat. I am the president of the Pennsylvania Farm Bureau, and I am pleased to offer this testimony, not only on behalf of our organization but also on behalf of the American Farm Bureau Federation and farmers and ranchers nationwide. We appreciate the invitation to comment at this legislative hearing on H.R. 2421, the Clean Water Restoration Act (CWRA).

Without question, the Federal Water Pollution Control Act of 1972, better known as the Clean Water Act (CWA), has been one of our nation's most successful environmental statutes. It is responsible for astounding success in improving the health of surface water everywhere in the United States. With that success, however, has come controversy. The regulatory reach of the federal Water Pollution Control Act, almost since the law's inception, has engendered many heated conflicts – over the federal/state relationship, over the question of "navigability" and – perhaps most critically – over the use of private property. The regulatory reach of the CWA, in particular, has kept courtrooms busy as the issue has made its way from the federal district and circuit courts to the United States Supreme Court on several occasions. Anyone who has ever had to deal with the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) can relay horror stories about regulatory creep, narrowing exemptions and ever-broadening interpretations of just what constitutes water or a wetland.

The scope of federally regulated waters is extremely important to farmers and ranchers because determinations of areas subject to or excluded from federal CWA regulation directly impact agricultural land. In fact, the jurisdictional reach asserted by the federal agencies has been and continues to be extensive in all cases and excessive in many. Over the 35-year history of the act, litigious activists have used our nations' courtrooms to convince judges to assert federal regulation of local canals, ditches and drains as "waters of the United States." This has had the effect of dragging agricultural operations into a regulatory quagmire that farmers never imagined could exist. For example, the use of herbicides, which are registered and fully regulated by EPA under the federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), now requires an NPDES permits in several western states. It is important to note that this legal and regulatory exercise comes with little or no real gain in water quality in rivers and streams. In fact, it significantly drains resources from the bottom line of many farmers and ranchers, and it results in additional costs for regulators. If H.R. 2421 was to become law, we predict more litigation and an escalation of the costs to comply both for regulators and the regulated community.

Farmers and ranchers are small business owners with a strong practical sense. We recognize and understand that words matter. It is clear to us that Congress intended to use the term "navigable waters" when it passed the CWA in 1972 – or it would not be there. H.R. 2421 would delete the term "navigable waters" from the CWA. It is our view, and that of many legal experts, that deleting this term from the 1972 act would fundamentally expand, not simply restore, the scope of areas that would be subject to federal regulation. The purpose of the deletion, as we understand it, is to sever any connection of federal

jurisdiction over U.S. waters from "navigable waters" and the Commerce Clause under the Constitution. Whether some intended to do that in 1972 may be open to debate; whether Congress did so is not. The history of the act amply demonstrates that the term "navigable waters" was and is at the root of the federal government's regulatory jurisdiction and should remain a part of the statute.

As currently drafted, H.R. 2421 would expand the geographic scope of CWA jurisdiction. Expanding jurisdiction will sweep many agricultural and forestry activities into the scope of CWA regulation simply because such activities are conducted near some isolated ditch, swale, wash, erosion feature or ephemeral stream that would be deemed a "water of the United States."

The legislation being discussed here today represents the most sweeping change to the law since its enactment in 1972. I would like to highlight several of the fundamental changes to the CWA that would occur if H.R. 2421 is enacted:

Navigable Waters: One has only to read the history of the CWA to recognize that Congress intended to use the term "navigable waters." CWA section 101(b) states "[i]t is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights* of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." CWA § 101(b) [emphasis added]. If all waters are subject to federal control, then few if any waters would be controlled by the states. Use of the term "navigable waters" clearly reflects the intended objective in the act to anchor and preserve this balance with the states. Moreover, it does so without jeopardizing – as some claim – the nation's ability to protect our waters. Deleting the term "navigable waters" from the CWA and replacing it with "waters of the United States" is an alteration to existing law that would unhinge the CWA from the Commerce Clause of the Constitution. Furthermore, as a new congressional pronouncement on federal regulatory jurisdiction, this alteration would have the effect of *wiping the slate clean* and effectively require a complete *do-over* of this part of the code of federal regulations, as well as 35 years of CWA judicial precedent.

It is important to note that H.R. 2421 contains a lengthy set of findings. These findings do not re-assert the "primary responsibilities and rights of the states." In fact, finding (14) explicitly reserves to states the rights and responsibilities only to "manage permitting, grant, and research programs to prevent, reduce, and eliminate pollution, and to establish standards and programs more protective of a State's waters than is provided under Federal standards and programs." This is a far cry from the language of 1972. It confirms for many the belief that H.R. 2421 is designed not to restore the Act's parameters but to expand them.

All Intrastate Waters: H.R. 2421, for the first time ever, extends federal jurisdiction to all "intrastate waters," erasing any distinction between federal waters and state waters. The intent is to make all waters federal waters. A consequence would be that essentially any wet area within a state – in fact, within the entire country – including ditches, pipes,

streets, municipal storm drains, gutters, erosion features, desert washes and even groundwater would be considered a "water of the U.S."

"Activities affecting these waters": This language has no precedent in the 1972 Act, subsequent amendments or existing regulation. It opens a door to federal regulators that is unprecedented in the law, and it opens up jurisdiction not just to "waters" but to dry land such as ditches or farm drainage features. The CWA today regulates discharges, not land-based activities. No reasonable reading of the provision can lead to any conclusion other than that it will impose burdens far beyond those envisioned in the original law.

Regulatory Exemptions: The new definition of "waters of the United States" in H.R. 2421 would require federal agencies to conduct new rule-makings under the Administrative Procedures Act in order to implement the new statutory designation. As a consequence, every existing regulatory provision would be open to reconsideration, amendment and, for those who disagree with the outcome, litigation. There is nothing in H.R. 2421 that would ensure continuance of the existing regulatory safeguards as they exist today. In fact, many believe just the opposite: that H.R. 2421 would eliminate the agencies' abilities to continue the common sense regulatory exemptions for prior converted cropland and waste treatment systems. Without either a statutory or regulatory exemption, in many cases prior converted croplands would be classified as federally regulated wetlands and would require a federal permit. To suggest that the protection of prior converted croplands and waste treatment systems is not affected by the text of H.R. 2421 is a fundamental misreading of the bill.

My own farm had drain tiles installed nearly 30 years ago, to make some of the wetter areas of the property into practical and productive agricultural land to feed and fuel our nation. H.R. 2421 could essentially re-open a 30-year can of worms and impose federal protections on my prior-converted cropland. This would only create additional work for farmers like me – as well as government officials – to apply for and issue a federal permit to do what I have been doing for three decades. As a result, there would be no discernable increase in water quality. Surely, there are more productive ways for America's tax dollars to be spent.

The extent of Congress's constitutional authority: The proposed statutory language extending federal jurisdiction to the fullest extent empowered under the Constitution will clearly expand current authorities. This ambiguous legislative approach will place critical regulatory decisions in the hands of constitutional lawyers and result in costly litigation to resolve the constitutional reach of federal jurisdiction into "intrastate waters." The bill's omission of current regulatory language providing for a connection to the Commerce Clause and the proposed statutory language extending federal jurisdiction to the fullest extent empowered under the Constitution will clearly expand current authorities.

Pennsylvania has more than 83,000 miles of rivers and streams, more than many states in the union. Most of these waters are currently listed as state waters. H.R. 2421, as currently written, would require a substantial increase in funding for the Corps and EPA

to handle the expected increase in demand for permits. This bill is essentially a call for bigger government. How, given the current budget deficit, does Congress intend to pay for additional regulatory enforcement? Will additional unfunded mandates be passed on to local municipalities to monitor and regulate federal waters?

The Savings Clause: This section of H.R. 2421 contains some of the language used in the existing statutory exemptions for a very narrow set of discharges. The savings clause, however, does not exempt anything from the broad definition of "waters of the United States." Nor does it capture exemptions found in statutory definitions, such as the agricultural storm water exemption. As noted above, not all agricultural and forestry activities enjoy the benefit of an explicit statutory exemption. Pesticide use, the application of fertilizer, and fire suppression activities, are just some examples of vital farming or forestry activities that may incidentally add material to "waters of the United States" and are not exempted by statute or addressed in the "Savings Clause" of H.R. 2421.

Successes of State Regulation: One item of specific interest to many supporters of this bill is that of wetlands. Pennsylvania is making great strides in administering programs to create and restore wetlands that serve the purpose of filtering and purifying water. In a 1994 study funded by the Chesapeake Bay Program, the National Wetlands Inventory concluded that between 1982 and 1989, "Pennsylvania gained 4,683 acres of wetland within the Chesapeake Bay watershed, indicating a significant shift to a gain of wetland resources for the first time." A Dec. 14, 2007, presentation by Pennsylvania's Department of Environmental Protection showed an increase of 2,500 acres in wetlands from 2000 to 2006. In 1995, Pennsylvania's Department of Environmental Protection reworked the entire permitting process to bring the state to lose less than 75 wetland acres annually. Pennsylvania also instituted a wetland mitigation program which has been used on numerous occasions by Pennsylvania Department of Transportation. According to the U.S. Fish and Wildlife Service's National Wetlands Inventory, roughly 404,000 acres of wetlands are now found throughout the commonwealth.

Many of Pennsylvania's waters are well known for their outstanding fishing characteristics. The compact Spruce Creek Valley, home to more than 5,000 dairy cows on multiple farming operations nestled between two mountains, boasts a renowned fly-fishing stream that has been noted as one of President Carter's favorite angling spots. The stream, Spruce Creek, meanders through acres of cultivated land with a history of liquid manure application, yet it provides a fly-fishing experience that is sacred among fly-fishing enthusiasts throughout Pennsylvania and neighboring states. Spruce Creek with its High Quality - Cold Water Fishery (HQ-CWF) designation is an example of the environmental stewardship successes already in place through agricultural practices.

Stream health and aquatic rebirth in the Keystone State are improving each year. An example of this will occur at the Pennsylvania Fish Commission meeting scheduled for next week (April 21 and 22, 2008) where 16 streams – in 11 different counties– will be presented to the Commission for adoption as Wilderness Trout Streams. The Pennsylvania Fish Commission defines such a stream as "a remote, natural and unspoiled

environment where man's disruptive activities are minimized." Wild trout are an excellent indicator of water quality and stream health.

Pennsylvania also has an effective nutrient management program in place. Each year, the commonwealth sees an increase in volunteer nutrient management planning – in the early 1990s fewer than 2,000 acres were enrolled in Pennsylvania's nutrient management program; today this program covers 1.3 million acres. This demonstrates farmers' and ranchers' desires to be good stewards of the land and to protect our natural resources for future generations. In truth, we are already doing so without federal jurisdiction over all bodies of water.

Additionally, Pennsylvania's State Conservation Commission implements the Dirt and Gravel Road Program. This program is an innovative effort to fund environmentally sound maintenance of unpaved roads that have been identified as sources of erosion and sediment pollution. The program is based on the principle that informed and empowered local effort is the most effective way to stop pollution. The Dirt and Gravel Road program has stabilized one quarter of a million square feet of streams near 640 miles of rural roads at more than 1,500 sites across the commonwealth since 1997. These state and local efforts are significantly reducing sediment discharge. Federal jurisdiction over these small streams would only complicate an already successful program.

Farmers, ranchers and landowners all across the country are already working with state and local officials to comply with water quality requirements. Adding the Corps of Engineers or the EPA to the existing regulatory equation will not only make conservation more difficult to accomplish but could stop good conservation efforts altogether.

Pennsylvania's agricultural community and our state's environmental regulatory agency, the Department of Environmental Protection, have taken significant steps in working cooperatively to improve our water quality. This positive effort has provided measurable benefits to the citizens of the commonwealth who live near or use waterways downstream. Days before this hearing was originally scheduled in December of 2007, I co-wrote an editorial with Secretary Kathleen McGinty of the Pennsylvania Department of Environmental Protection. The editorial appeared in *The Harrisburg Patriot* newspaper discussing regulatory requirements imposed at the state level which are effective for our unique geographic location. It seems counter-intuitive to impose a one-size-fits-all federal regulation over all 50 states nullifying productive state efforts or making access to such programs more difficult by adding additional levels of bureaucracy.

Our Department of Environmental Protection has publicly recognized the significant contribution that Pennsylvania's farmers have made in improving water quality in the state's waterways. On January 17, 2008, while speaking before the State Conservation Commission, Deputy Secretary Cathleen Curran Myers noted: "Pennsylvania's Chesapeake Bay Compliance Plan requires 25 million pounds of nutrient reduction from our farmlands – nearly five times the reduction required of our sewage treatment plants

… Our farmers are rising to the challenge, laying claim to more than half of all the nitrogen reductions made by farmers in the multi-state watershed thus far."

In Pennsylvania, water quality improvements have been made as a result of the following state regulations and initiatives (as well as others, not mentioned below):

- Pennsylvania Erosion and Sediment Control Regulations
  All farms must implement best management practices (BMPs) to control erosion and sedimentation for all disturbed lands, including plowing and tilling activities. Written erosion and sedimentation (E&S) control plans must be kept on site for all plowing and tilling activities that disturb 5,000 square feet or more. Plans must contain plan maps, soils maps, waters of the Commonwealth, drainage patterns, Best Management Practices, descriptions of tillage systems used and schedules.
- Mandated State Standards for Storage and Land Application of Manure
  Every animal farmer, regardless of the farm's size or animal concentration, must operate his or her farm and manage animal manure in a manner that is consistent with the practices and standards identified in DEP's "Manure Management Manual for Environmental Protection." Any practice that substantially deviates from the Manual's practices and practices must obtain specific approval or permit from DEP.
- Pennsylvania Clean Streams Law
  Prohibits discharges of animal waste into streams. The degree of penalties to be assessed are based on the willfulness of the violation, the damage or injury that occurs to the waters or natural resources of the Commonwealth, the costs for correcting or mitigating the damages, and other relevant factors. Substantial penalties are often assessed on violations that result in fish kills or other serious injury to aquatic life.
- Pennsylvania's Nutrient and Odor Management Act
  Prohibits Concentrated Animal Feeding Operations (CAFOs), Concentrated Animal Operations (CAOs) and any operation receiving animal manure from a CAFO or CAO from mechanically land applying the manure within 100-feet of a perennial or intermittent stream with a defined bed or bank; a lake; or a pond. Exceptions exist where a qualified 35-foot vegetated buffer is established along the water bodies. Recent statutory and regulatory changes to the Act also require the development and implementation of nutrient plans that prevent the pollution of both nitrogen and phosphorus into waters of the Commonwealth and that prevent nutrient runoff from off-farm sites on which manure generated from a CAFO or CAO farm is applied.
- Pennsylvania Concentrated Animal Feeding Operation (CAFO) Program
  Requires either National Pollutant Discharge Elimination System (NPDES) general or individual permits for animal operations with over 1,000 Animal Equivalent Units (AEUs) and CAOs with over 300 AEUs. Pennsylvania's CAFO permitting program has been expanded to include: poultry operations that use dry manure handling systems and are CAOs with more than 300 AEUs or that have 1,000 or more AEUs; horse operations that are CAOs with more than 300 AEUs or that have 1,000 or more AEUs; or any animal operation defined as a large

CAFO under the Federal CAFO Regulations. The scope of farms required under state law to obtain NPDES permits is broader than the scope of farms required to obtain NPDES permits under federal law.

- Best Management Practices Manual for Pennsylvania Livestock and Poultry Operations
  This manual was developed to outline Best Management Practices (BMPs) which can assist livestock and poultry operations in their effort to protect local and regional natural resources, and to allow them to successfully integrate into the neighboring community. Some of the BMPs described are mandatory due to current regulations; other voluntary efforts are suggested to assist producers in addressing specific concerns.
- Pennsylvania Fish and Boat Code
  Prohibits the placement or allowance of any substance harmful to fish into streams. In addition to imposition of fines, a person who places or allows a substance into a stream is required to pay damages for fish that are killed or injured as a result of the substance being introduced into the stream. Penalties and damages are in addition to any penalties that may be assessed under the Clean Streams Law.
- Pennsylvania Stream Protection Program
  Allows streams to upgrade to High Quality (HQ) or Exceptional Value (EV) protection status. The program regulates activities and discharges adjacent to upgraded streams.
- Pennsylvania Dam Safety and Encroachment Act
  Permits are required for activities located in, along or across streams or wetlands. Pennsylvania's wetland protection regulations exceed federal requirements.
- Pennsylvania Flood Plain Management Act
  The construction of manure storage facilities in a flood plain must meet upgraded construction standards.

In conclusion, H.R. 2421 will not only expand the act's reach of federal regulatory jurisdiction, but it also will likely cause a new wave of litigation over matters of jurisdiction that have been somewhat settled. H.R. 2421's proposed statutory change to describe federally regulated waters does nothing to clarify or eliminate the confusion over federal jurisdiction. In fact, many believe amending the law in this fashion will actually relegate the question of jurisdiction to the courts. We all know that EPA and the Corps of Engineers have avoided their responsibility to do a rule-making and have a track record of using policies and guidance documents to erode exemptions, expand jurisdiction and inject federal regulation and oversight onto more and more private land in a manner that invites conflict.

Prior to the Supreme Court's ruling in *Solid Waste Agency of Northern Cook County* (*SWANCC),* federal agencies attempted to assert jurisdiction over any water body that may potentially be used by migratory birds that fly between or among states. The Supreme Court stated that this "bird rule" went too far and had no relation to the CWA. The Court, in *SWANCC*, recognized and relied upon the CWA's use of "navigable" in the

context of the act's description of federal jurisdiction to conclude that the scope of areas where federal agencies may regulate is limited. Legislation that asserts jurisdiction to what was in existence prior to *SWANCC* does not "restore" federal authority; it would explicitly authorize such jurisdiction for the first time. Moreover, it would authorize federal control as broad or broader than the "bird rule."

In summary, H.R. 2421 would apply the broadest possible interpretation of the CWA, subject only to constitutional limits, and would remove the regulatory boundaries to federal jurisdiction that Congress intended to draw in the CWA throughout its 35-year existence. For these reasons, we oppose H.R. 2421 and urge that it not be approved by the committee. From our perspective (and one that is shared by the Supreme Court), Congress should direct the agencies to conduct a rule-making to resolve any outstanding disputed questions of jurisdiction.

We appreciate your interest in this issue and the opportunity to submit this testimony.